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COMMISSION OF INQUIRY

RE SALARIES OF PROVINCIAL COURT JUDGES

PROVINCE OF NEW BRUNSWICK

1989

REPORT

Commissioners:

Wade MacLauchlan (Chair)
David Case, Q.C.
Marielle Préfontaine

July 12, 1989

THE MANDATE

The Government of New Brunswick has constituted us as a Commission for the purpose of recommending an appropriate salary for Provincial Court Judges for the 1989-90 fiscal year, and to recommend a mechanism for future salary determinations. The specific mandate, as set out in a letter dated April 14, 1989, from James Lockyer, Q.C., Minister of Justice, is as follows:

> 1. That the Minister of Justice be authorized to appoint an independent Commission of three persons to make recommendations on:
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> - The appropriate level of annual salaries to be paid to the Chief Judge, the Associate Chief Judge and Judges of the Provincial Court, effective April 1, 1989.
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> - A procedure to be used in future years.

THE PROCESS

After an initial round of informal discussions among the members of the Commission, and with Chief Judge Strange, Deputy Minister of Justice LeBreton, and Wayne Chapman, Q.C., acting for the Provincial Court Judges, it was decided to request that written submissions be made on behalf of the Judges and on behalf of the Government. As well, the Law Society of New Brunswick and the Canadian Bar Association - New Brunswick were contacted and asked whether they wished to make submissions.

A written submission (dated May 19, 1989) was received from the Provincial Court Judges Association of New Brunswick. We received a letter (dated May 15, 1989) from Hon. Gerald Clavette, Chairman of the Board of Management, indicating that the Government had given the matter careful consideration and decided not to make a written submission to the Commission, citing "the same logic that led us to conclude that a commission would be a more appropriate body for bringing recommendations forward to the government on this matter." Written submissions were received from the C.B.A. - New Brunswick and from the Law Society. As well, we received a letter from Judge Kenneth L. Crowell in his capacity as President of the Canadian Association of Provincial Court Judges.

On May 30, 1989, meetings were held in Fredericton with representatives of the Provincial Court Judges, as well as with representatives of the Law Society and the C.B.A. - New Brunswick. Present were the three members of the Commission, Chief Judge Strange, Judge McNamee, Judge Cumming, Judge Dumont,

Wayne Chapman, Q.C., David Lutz, on behalf of the Law Society, and Roland Levesque and Bernard Leblanc, on behalf of the C.B.A. - New Brunswick.

AN APPROPRIATE SALARY FOR 1989

The current salary of Provincial Court Judges in the Province of New Brunswick is $75,036. This is the lowest salary of any Provincial or Territorial Court in Canada and is $58,000 less than the salary of $133,400 that, as of April 1, 1989, is received by federally appointed judges, including members of the New Brunswick Court of Queen's Bench.

It is readily apparent that the salary for 1989 must be increased from its present level of $75,036. The Judges express considerable dissatisfaction. Provincial Court Judges in other jurisdictions have received substantial increases. The gap between the salaries of Provincial Court Judges and those of members of the Court of Queen's Bench continues to widen. Without a substantial increase, the current salary may be inadequate to continue to attract, and retain, legal professionals of the calibre appropriate for the position.

It is our view that an appropriate salary for members of the Provincial Court of New Brunswick ought to be established in accordance with the following criteria.[1]

- The salary should be adequate to attract to the Bench highly qualified and competent members of the professional community, and to stimulate and retain them for the duration of their careers.

- The salary should achieve a measure of economic fairness, relative to comparable professional groups, consistent with the circumstances and the reasonable expectations of the New Brunswick community.

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[1]. In developing these criteria we have the benefit of several reports that have been prepared recently in various Canadian jurisdictions. These include the Heustis Report (Nova Scotia, 1989); the Henderson Report (Ontario, 1988); the MacLauchlan Report (Prince Edward Island, 1987); the series of triennial reports prepared for the Government of Canada regarding the salaries of federally appointed judges; the Osborn Report (Newfoundland, 1985); the DeCoster Report (Quebec, 1984)). As well we have the benefit of a document entitled Proposals for Change, prepared by the Salary and Compensation Committee of the Provincial Court Judges of New Brunswick, dated February 1, 1989.

Attracting and Retaining Experienced and Competent Lawyers:

There are two aspects to this analysis. First, what salary would be required to attract competent and highly qualified members of the professional community to the bench. Second, what salary would be required to retain on the bench productive, committed judges. Both of these inquiries assume a normal set of financial obligations, including the option of being the sole provider for a family or for dependents.

Information regarding the earnings of self-employed professionals is not easily obtained. Indeed, short of the kind of profile of lawyers' earnings that might be provided by Revenue Canada, we are doubtful whether it is possible to deal with this issue in any scientifically defensible manner. Still, we did have evidence in the course of our hearings, primarily from Mr. Lutz, who is Treasurer of the Law Society, and Mr. Levesque, who appeared on behalf of the C.B.A.-New Brunswick, to the effect that the current salary of $75,000 is seriously inadequate to attract to the Bench a productive private practitioner with at least ten years' experience.

Based on the information that we have received, it is our view that the current salary of Provincial Court Judges in New Brunswick is attractive to lawyers, such as Crown prosecutors, from government service, but that the salary is unattractive to lawyers from private practice with the requisite experience and competence. In our view, if this situation is not redressed, there is a danger that the Provincial Court of New Brunswick may come to be perceived as a "Crown court". Such a popular perception would seriously undermine the image of the administration of justice in New Brunswick, and must not be permitted to develop further.

It was also submitted to the Commission that New Brunswick is in a unique position among Provincial Courts in Canada, in that it is desirable to attract to the Bench lawyers who are capable of conducting proceedings in either English or French. In this regard, the provincial government is in effect "competing" with the federal government as well as with private practice opportunities for the most competent bilingual practitioners. Again, based on the information available to us, we do not feel that the current salary of $75,000 is adequate.

Judicial salaries ought to be adequate to stimulate and retain members of the Provincial Court on the Bench for the duration of their careers. We were not informed of any Judges who have left the Bench to pursue more lucrative private practice. However we are convinced, based on comments that were made in the course of our hearings, that there is a distinct risk of departures from the Provincial Court by the most vital and competent members of

that Court if salaries are not substantially increased. This was not put to us in the form of an ultimatum, but in the form of an articulate and persuasive statement of financial responsibilities and opportunities.

We are informed that, as of April 1, 1988, the average age of Provincial Court Judges in New Brunswick was 52.4 years. The average number of years since being called to the Bar was 27.3 and the average number of years on the Bench was 9.6. We are convinced that a salary of $75,000 per year is not adequate to stimulate and retain on the Bench persons of this degree of experience. As well, we are concerned that the current salary is inadequate to retain on the bench Judges who face heavy financial burdens in assisting family members with university education. Unless the Provincial Court is to become either a revolving door or a pre-retirement haven for those wishing to build up a pension plan, it will be necessary to substantially increase judicial salaries.

Economic Fairness:

New Brunswick's Provincial Court Judges are currently the most poorly paid of any Provincial or Territorial Court Judges in Canada. The disparity of $58,000 between the annual salaries of members of the Provincial Court and members of the Court of Queen's Bench is a source of considerable unhappiness among the members of the Provincial Court. On the face of it, a substantial salary increase can be justified in terms of economic fairness.

The salaries of Canadian Provincial and Territorial Court Judges, as of April 1, 1989, were as follows:

1.	Alberta	$106,720[2]
2.	Ontario	105,000[3]
3.	N.W.T.	91,000
4.	Quebec	90,354[4]
5.	Nova Scotia	89,000
6.	British Columbia	87,826
7.	P.E.I.	85,632
8.	Yukon	82,250
9.	Manitoba	81,874
10.	Saskatchewan	80,052
11.	Newfoundland	78,500
12.	New Brunswick	75,036

Historically, New Brunswick's Provincial Court judges have not been the most poorly paid in Canada. As recently as two years ago, the New Brunswick salary exceeded the salaries paid at that time to Provincial Court judges in Prince Edward Island, Nova Scotia or Newfoundland by more than $8,000. In the intervening two years, judges in Nova Scotia and Prince Edward Island have received substantial salary increases. Nova Scotia salaries now exceed those of New Brunswick by $14,000; and P.E.I. salaries exceed those of New Brunswick by $10,000. We note that the requirement of ten years' experience before appointment is unique to New Brunswick. Nova Scotia and Prince Edward Island require a minimum of five years' experience. And, we reiterate the point made earlier regarding the desirability of appointing qualified bilingual judges in New Brunswick. It is our view that a persuasive case can be made for a substantial increase to restore an appropriate relationship between New Brunswick salaries and those in other provincial jurisdictions.

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[2]. Calculated on the basis of 80% of the salary of Superior Court Judges, which increased to $133,400 as of April 1, 1989

[3]. Based on the an announcement by Minister of Justice Ian Scott, in conjunction with the introduction of Bills 2 and 3 in early May. These Bills have now received first and second reading by the Ontario legislature (as of June 1, 1989).

[4]. The figure of $87,826 was furnished by the Provincial Court Judges, as of February 1, 1989. More up-to-date figures have been obtained from officials in Prince Edward Island, where the Provincial Court Judges and the Government agree on the relevant salaries across the country as a function of the annual salary adjustment. The annual salary is set in P.E.I. as the national average of other Provincial and Territorial Court Judges.

The principal position of the Provincial Court judges is that the relevant comparison is to the salary of judges of the Court of Queen's Bench. This position is most starkly put in terms of the statement that "a judge is a judge is a judge". The position is that, apart from appellate functions, the roles and responsibilities of the Provincial Court and the Court of Queen's Bench are incapable of being distinguished. Statistics presented to the Commission by the judges indicate that, in terms of the number of matters handled annually, the numerical caseload of the Provincial Court is substantially greater than that of the Court of Queen's Bench.[5]

We accept that the current disparity between the salaries of the Queen's Bench judges and the salaries of Provincial Court judges in New Brunswick cannot be justified on the basis of different responsibilities or different qualifications. It was the position of the Provincial Court judges before the Commission that a differential of $10,000 per annum might be justified as a reflection of the appellate functions of the superior courts, although it was acknowledged that no such differential exists between the salaries of members of the Court of Queen's Bench and the Court of Appeal. Another approach suggested was that a fixed percentage might be established between the salaries of Queen's Bench and Provincial Court judges, such as is done in the case of Alberta. We note that the position of the Provincial Court judges before this Commission has not been accepted in recent reports in Nova Scotia, Ontario or Prince Edward Island. The Henderson Committee in Ontario assessed the argument as follows:

> Even assuming the duties assigned to the two courts are equivalent, it does not follow that Provincial Court judges ought to receive the same amounts as the federal government now pays the District Court judges. Neither does it follow that Provincial Court judges' salaries ought to be expressed as a function of the salaries of District Court judges. We have reached these conclusions for three reasons.
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> First, we cannot accept that if the two groups deserve the same salary, the salary they deserve is the one that the higher paid group is now receiving; that position needs independent support....
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> Second, we cannot ignore the fact that the two groups of judges are paid by different levels of government

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[5]. These caseloads involve differing degrees of complexity of fact and law. We are unable, based on the information available to us, to evaluate these relative "workloads". We are satisfied that the complexity of matters handled by the Provincial Court has increased over time.

> and that those levels of government have different powers and responsibilities....Any salary recommendations for judges paid by Ontario have, therefore, to reflect the conditions that obtain in Ontario....
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> [The third reason expressed by the Henderson Committee relates to the recommendations, which were then pending, of the Zuber Commission, including the abolition of the District Court in Ontario.][6]

The Heustis Committee in Nova Scotia similarly declined to accept the proposition that Provincial Court salaries ought to bear a fixed relationship to those of superior courts. The MacLauchlan Report in the case of Prince Edward Island dealt with the issue of parity or linkage between superior and provincial court salaries at considerable length, and concluded that the arguments against such a recommendation were two-fold: first, loss of control of the process of establishing salaries; and, second, differing sets of fiscal responsibilities and community expectations. To quote the 1987 Prince Edward Island Report:

> The salaries of Superior Court Judges are not fixed in relation to the community of Prince Edward Island. They are established with an eye to attracting the busiest and most financially successful members of the Bar in the larger metropolitan centres across Canada....This Commission is of the view that it would be contrary to the public interest of the Province to leave essential conditions of the administration of justice in Prince Edward Island to be determined by a national committee driven by the experience of Bay Street.[7]

The effective conclusion of these three previous reports dealing with essentially the same issue has been that the current salaries of Canadian superior court judges are beyond what reasonable members of the relevant provincial communities would consider to be fair and adequate compensation for provincially paid judicial personnel. If the case for a salary equal to that of superior court judges is to be made out, it must be in terms of expectations of the New Brunswick community, not in terms of an appeal to formal equality with judges who are appointed and paid by the federal government. It is our view that the case for Provincial Court salaries in the order of those currently paid to superior court judges across Canada has not been made out in relation to the New Brunswick community.

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6. Henderson Report, supra, note 1, at 68-69.

7. MacLauchlan Report, supra, note 1, at 38-39, and 43.

While we do not accept the principle of direct linkage to the salaries of superior court judges, we cannot overlook the fact that the differential between the salaries paid to Provincial Court judges and those paid to federally appointed judges in New Brunswick is the legitimate source of considerable unhappiness, perhaps even of demoralization, on the part of the Provincial Court judges. The salary "gap" has widened considerably in recent years, while the relative responsibilities of Provincial Court judges have increased. In 1975 the salary "gap" was $11,000. As of April 1, 1989, it has widened to $58,000, subject to the recommendations of this Commission. Unless irreparable damage is to be done to the morale of New Brunswick's Provincial Court judges, and to the prospects of attracting high quality candidates to the Provincial Court, the "gap" must be narrowed.

Conclusion re an appropriate salary as of April 1, 1989

It is our conclusion that the salary of Provincial Court judges in New Brunswick ought to increase to $95,000 per annum as of April 1, 1989. This level of salary is necessary: (a) to attract to the Bench highly qualified and competent members of the professional community, and to stimulate and retain them for the duration of their careers; and, (b) to achieve a measure of economic fairness, relative to comparable professional groups, consistent with the circumstances and the reasonable expectations of the New Brunswick community.[8] In particular, it is essential to make some gesture toward reducing the current disparity between the salaries of federally and provincially appointed judges.

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[8]. In this report we have restricted our analysis of comparable professional groups to superior court and other provincial court judges, and we are satisfied that these are the two most important comparisons, together with the assessment of what is required to attract qualified professionals. It was the submission of the Provincial Court judges that no comparison can be made to other public servants, since the same conditions do not obtain, and, in particular, since such comparisons might undermine the principle of judicial independence. It is our view that, while direct comparisons are not appropriate, some reference to the experience and reasonable expectations of the New Brunswick community regarding the compensation of senior public servants, relative to the compensation of senior public servants in other jurisdictions, might usefully bear upon the issue of economic fairness. Of course any such analysis would have to bear in mind the special limitations that are placed upon financial activity of Provincial Court judges by the principle of judicial independence.

A PROCESS FOR FUTURE SALARY DETERMINATION

There are few workable options when searching for a mechanism by which to determine judicial salaries. The current mechanism of "bargaining" between the judges and the government is difficult, if not impossible, to reconcile with the arm's length relationship required for judicial independence. Moreover, the experience of awkward "bargaining", culminating in what is perceived to be a unilateral decision by the government, has been a human relations failure. The process has been at least as debilitating in terms of the relationship between the government and the judges, as has been the perceived inadequacy of judicial salaries. In our view, there cannot be a return to that process. And, it is our understanding that the government has recognized this reality in the establishment of this Commission.

Nova Scotia has adopted the approach of annual reviews by independent committees, leading to recommendations that are binding on the Legislature. Other jurisdictions have appointed periodic advisory committees. Prince Edward Island has adopted the national average of the salaries of Provincial and Territorial Court judges. The New Brunswick judges suggest an ongoing fixed relationship to the salaries of federally appointed judges, an option that we have already declined to adopt.

The Prince Edward Island approach responds to the particular circumstance of a three-judge Provincial Court bench and the consequent impossibility of periodic assessments free from personality issues. As well there is the question of administrative cost and personal energy required for periodic reviews. The former concern need not apply in the same measure to New Brunswick. The latter concern is one that ought to be kept in mind, but need not be determinative. On balance, we do not feel that the "national average" approach is warranted in the case of New Brunswick.

The remaining viable option is a periodic committee review, leading to conclusions that could be either recommendatory or binding. The experience with recommendatory committees in Canada has not been a happy one. Recommendations have often not been followed, or their implementation has frequently been delayed. It may even be that the process is inherently flawed. Committees may feel less constrained, since the government has the opportunity to reject their advice. As well, rejection of committee recommendations serves only to exacerbate relations between the judiciary and the government. It is our view that a recommendatory process, by leaving it to the government to accept or reject the committee's advice, is only a marginal improvement on direct "bargaining", as regards the principle of judicial independence. In light of these concerns, we do not feel that a recommendatory process ought to be adopted in New Brunswick.

This brings us to the Nova Scotia model, that of a regular review by an independent committee reaching conclusions that are binding on the Legislature. First, we are concerned that an annual review is too frequent. The process becomes almost continuous, with the consequent distraction of the parties from their primary tasks. The cost, both economic and intellectual, is too great. We retain a second, more fundamental, concern about binding recommendations, a concern related to democratic values. The basic task is to determine a level of compensation that is reasonable and adequate in the circumstances of the New Brunswick community. This is a matter that ought to be open at some point to the judgment of the Legislature.

The challenge is to balance concerns about democratic values with concerns about judicial independence. We recommend that this balance be achieved by adopting the binding committee approach, subject to a clause similar to what is known in commercial contracts as an "evergreen clause", whereby, in the absence of legislative rescission, the mechanism would remain in place. Accordingly, we recommend:

(i) that the salary for 1989-90 be established at $95,000;

(ii) that the salary for 1990-91 be determined, with $95,000 as a base, by applying the formula adopted by s.25(1) of the Judges Act, R.S.C. 1985, c.J-1, and adding $5,000[9];

(iii)that the salary for 1991-92 be determined, with the 1990-91 salary as a base, by applying the formula adopted by s.25(1) of the Judges Act, and adding $5,000;

(iv) that the salary for 1992-93 be determined by a commission constituted during the 1991-92 year;

(v) that the salary for the years 1993-94 and 1994-95 be established according to the formula used for the years 1990-91 and 1991-92, although the commission constituted during the year 1991-92 may vary, or dispense with, the $5,000 "gap-closing" factor applied

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9. The $5,000 increment recognizes that, in the normal course of events, the "gap" between the salaries of Queen's Bench judges and those of Provincial Court Judges will continue to widen, both as a function of the application of the percentage increment, and because 1989-90 is a triennial review year under the scheme of the Judges Act. In our view, it is important to at least make a gesture toward closing the "gap".

during 1990-91 and 1991-92;

(vi) that, during the year 1993-94, the government review the process with a view to leaving in place, amending or repealing the legislatively established triennial commission.

This proposal seeks to combine several elements. It leaves a legislative "escape hatch", while ensuring that actual salary determinations are carried out in a manner that respects the principle of judicial independence. It seeks to minimize administrative costs by conducting triennial reviews. It seeks to address the salary "gap" between provincially and federally appointed judges, without sacrificing the principle of sensitivity to local circumstances and without depriving the New Brunswick Legislature of ultimate control. And, it establishes a salary that is attractive to qualified practitioners and that is economically fair.[10]

In conclusion, we wish to make some observations regarding the process and constitution of the commission recommended for 1991-92. First, the government, either through representatives of Management Board or through a third party named by the government, should have the opportunity to make representations to the commission. As has been emphasized throughout this report, the essential standards for determination of judicial salaries are:

- The salary should be adequate to attract to the Bench highly qualified and competent members of the professional community, and to stimulate and retain them for the duration of their careers.

- The salary should achieve a measure of economic fairness, relative to comparable professional groups, consistent with the circumstances and the reasonable expectations of the New Brunswick community.

With respect to both judicial recruitment experience and the circumstances and reasonable expectations of the New Brunswick community, a representative of the government could contribute to the deliberations of the commission without detracting from the principle of judicial independence, and without undermining relations with members of the Provincial Court. It is, in our view, critical to the success of such commissions that they serve

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10. We have made no recommendation regarding the stipend paid to the Chief Judge or Associate Chief Judge. Before the Commission, Chief Judge Strange emphasized that it was more important at this stage to address the issue of the basic salary.

as an opportunity for the Provincial Court judges and the Government to carry on a dignified but frank "conversation" about salaries, without doing so in circumstances where the Government retains the ultimate "trump".

Second, we recommend that the inquiry fully explore the issues of judicial recruitment and economic fairness. At the same time, the inquiry ought not to be allowed to become an open-ended inquiry into the administration of justice, or into the quality of current judicial personnel. In this 1989 inquiry we have preferred a relatively closed-ended procedure. We are satisfied that we have obtained an insight into the situation of New Brunswick's Provincial Court judges, and we are most appreciative of the contribution of representatives of the Law Society and the C.B.A.-New Brunswick. However we are conscious of a danger that the process may be perceived to be "captured" by a restricted professional class, and reiterate our concern that the inquiry explore the issues fully. On balance, we believe the most appropriate process would be for a third party to be engaged to represent the "public interest" before the commission.

Third, as regards the composition and selection of future commissions, we recommend that: neither judges nor employees of the Province of New Brunswick be appointed to the Commission; that there be one member of the commission selected by the government, one selected by the judges' association, and a chair named by the government in consultation with the judges; and, that not more than one member of the commission be a member of the New Brunswick Bar.

CONCLUSION

We conclude with a note of appreciation to those who assisted the Commission with its deliberations. The issue of salary determination is not an easy one. We remind the government of New Brunswick that this Commission was established out of a desire to improve upon relations between successive governments and the judges of the Provincial Court. We hope that the conclusions and recommendations of this report will contribute to that process.

Signed,
July 12, 1989

Wade MacLauchlan

Marielle Préfontaine

David Case